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ATTORNEY GENERAL OF TEXAS

July 20, 2016

Ms. Susan E. Tennyson
DFPS Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030, Department Mail Code E611
Austin, Texas 78714-9030

OR2016-16328

Dear Ms. Tennyson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 619315 (ORR# 04072016VAY).

The Texas Department of Family and Protective Services (the "department") received a request for communications with the Office of the Governor (the "OOG") for a specified period of time.¹ The department states it will release some of the requested information, but claims some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments submitted by the OOG. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the OOG asserts some of the submitted information is not responsive to the request for information because it does not fall within the specified period of time. This ruling does not address the public availability of any information that is not responsive to the request, and

¹The department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

the department is not required to release this information, which we have marked, in response to this request.²

Next, we note in Open Records Letter No. 2003-5590 (2003), we issued a previous determination authorizing the department to withhold, without the necessity of seeking a decision from this office, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, unless the department's rules permit the department to release requested records to a particular requestor. *See id.*; Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). Thus, pursuant to Open Records Letter No. 2003-5590, the department must withhold the information it has marked under section 552.101 in conjunction with section 261.201(a).³

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 40.005 of the Human Resources Code authorizes the department to adopt rules for the purpose of preserving the confidentiality of information and provides, in part, the following:

(a) The executive commissioner [of the of the Health and Human Services Commission] shall establish and the department shall enforce rules governing the custody, use, and preservation of the department's records, papers, files, and communications.

(b) The executive commissioner [of the of the Health and Human Services Commission] shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a department service or to an investigation the department conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of the department's programs and must comply with applicable state and federal law and department rule.

²As our ruling is dispositive, we do not address the other arguments of the department and the OOG to withhold this information. We also note the department marked some of the nonresponsive information under section 552.107 of the Government Code, but did not submitted arguments explaining how this exception applies to the information at issue. We presume the department does not assert section 552.107 for any the submitted responsive information. *See* Gov't Code §§ 552.301, .302.

³As our ruling is dispositive, we do not address the other argument of the department to withhold this information.

Hum. Res. Code § 40.005(a)-(b). Rules governing the confidentiality of department investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code. The department promulgated section 711.601 of title 40 of the Texas Administrative Code in accordance with section 40.005 of the Human Resources Code to make confidential records related to department investigations of facilities operated by the Department of Aging and Disability Services (“DADS”). Section 711.601 provides, “[t]he reports, records, and working papers used by or developed in the investigative process, and the resulting investigative report, are confidential and may be disclosed only as allowed by law or this chapter.” 40 T.A.C. § 711.601. The department indicates the information it has marked under section 711.601 relates to department investigations of abuse or neglect at facilities operated by DADS. Thus, we find this information is subject to section 711.601. The department states the requestor is not entitled to receive a copy of the investigative report. *See id.* § 711.605. Based on these representations, we agree the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and section 711.601 of title 40 of the Texas Administrative Code.

The department also promulgated section 745.8485 of title 40 of the Texas Administrative Code to make confidential certain child care facility license investigations and records. Section 745.8485(a) provides, “all investigations are confidential until [the department] complete[s] the investigation and make[s] a finding.” 40 T.A.C. § 745.8485(a). The department explains the information it has marked under section 745.8485(a) consists of information developed during investigations of alleged child abuse or neglect at licensed child care facilities. The department indicates the investigations at issue were ongoing at the time it received the request. We understand the information at issue is not required to be maintained in the department’s monitoring files. *See id.* §§ 745.8481(a) (information in monitoring file is for most part available to general public), .8487(a) (department may release to public only those portions of abuse or neglect investigation record that must be filed in monitoring file), .8489 (except for certain specified information, department will maintain all records of abuse or neglect investigation separate from monitoring file). Based on these representations, we find the information at issue falls within the scope of section 745.8485(a). Accordingly, the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at

683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find none of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus,

section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See Open Records Decision No. 561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.* at 9.

The department and the OOG assert they share a common deliberative purpose regarding the information at issue, and assert some of the remaining information consists of communications of department and OOG personnel that constitute advice, opinion, and recommendations regarding department and OOG policy. The department also states some of this information consists of drafts that were or will be released to the public in their final form. Upon review, we find the department and the OOG have established the deliberative process privilege is applicable to some of the remaining information, which we have marked. Therefore, the department may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information, or does not pertain to policymaking. Accordingly, the department may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Section 552.117 of the Government Code may be applicable to some of the remaining information.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987)*.

a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The remaining information contains cellular telephone numbers of department employees. Therefore, the department must withhold the cellular telephone numbers of department employees in the remaining information under section 552.117(a)(1) if the employees at issue made timely elections to keep the information confidential and if the cellular telephone service was not provided to the employees at issue at public expense. However, the department may not withhold the cellular telephone numbers at issue under section 552.117(a)(1) if the employees at issue did not make timely elections to keep the information confidential or if the cellular telephone service was provided to the employees at public expense.

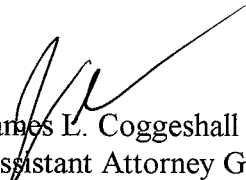
Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the department must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

To conclude, the department must withhold the following: (1) pursuant to Open Records Letter No. 2003-5590, the responsive information it has marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code; (2) the responsive information it has marked under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and sections 711.601 and 745.8485(a) of title 40 of the Texas Administrative Code; (3) the cellular telephone numbers of department employees in the remaining responsive information under section 552.117(a)(1) of the Government Code if the employees at issue made timely elections to keep the information confidential and if the cellular telephone service was not provided to the employees at issue at public expense; and (4) the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The department may withhold the information we have marked under section 552.111 of the Government Code. The department must release the remaining responsive information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

JLC/bhf

Ref: ID# 619315

Enc. Submitted documents

c: Requestor
(w/o enclosures)